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No. 89-1627

In The

Supreme Court of the United States

October Term, 1989

DIEDRE V. BATCH,

Petitioner,

v.

TOWN OF CHAPEL HILL,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of North Carolina

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, JR.
R. S. RADFORD
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI 1

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI 4

INTERESTS OF AMICUS CURIAE 4

STATEMENT OF THE CASE 4

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA 7

II. THE DECISION BELOW, IF ALLOWED TO STAND, WILL RESULT IN A TAKING OF PETITIONER'S PROPERTY WITHOUT JUST COMPENSATION 9

CONCLUSION 14

TABLE OF AUTHORITIES CITED

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 9

Armstrong v. United States, 364 U.S. 40 (1960) 7, 13

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 2

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 8

Hodel v. Irving, 481 U.S. 704 (1987) 2

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 2

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) ..... *passim*

Seawall Associates v. City of New York, 542 N.E.2d 1059 (N.Y. 1989) 12

RULES AND REGULATIONS

Supreme Court Rule No. 10.1.(c) 6, 8

No. 37 1

MISCELLANEOUS

Note, Ohio v. Johnson: The Continuing Demise of the Adequate and Independent State Ground Rule, 57 U. Colo. L. Rev. 395 (1986) 9

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This motion of Pacific Legal Foundation (PLF) for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule No. 37. Consent to the filing of this brief has been granted by counsel for petitioner, and has been lodged with the Clerk of this Court. Consent has been withheld by counsel for respondent, Town of Chapel Hill.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The present case involves an egregious violation of federal constitutional rights in the guise of local land use regulation. The decision below rests on the principle that government may prohibit the otherwise lawful development of private property, if that property may someday

be condemned for public use. In effect, the value of petitioner's property has been permanently depressed in order to minimize the government's subsequent cost of acquisition—if indeed the government ever decides to acquire the property.

This amicus believes the opinion below is in direct conflict with this Court's decision in *Nollan* and other regulatory takings cases. If allowed to stand, the opinion below will constitute a serious setback for individual rights by undermining the constitutional prohibition against taking private property without just compensation. This result would abridge fundamental notions of fairness and equity by unconscionably tipping the constitutional balance in favor of the state's regulatory power over the rights of the individual.

For the foregoing reasons, Pacific Legal Foundation requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: May 16, 1990.

Respectfully submitted,

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, JR.
R. S. RADFORD
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-2888

By _____
EDWARD J. CONNOR, JR.

Attorneys for Amicus Curiae,
Pacific Legal Foundation

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INTEREST OF AMICUS CURIAE

The interests of amicus are set forth in the preceding motion for leave to file brief amicus curiae of Pacific Legal Foundation.

STATEMENT OF THE CASE

This case involves a regulatory taking effected by the Town of Chapel Hill (Town) through its subdivision

approval process. The subdivision application of petitioner, Diedre V. Batch, was denied because she refused to comply with certain conditions demanded by the Town's planning staff. One of these conditions was a requirement that petitioner dedicate a right-of-way for a proposed limited access highway across her property. The Town's desire to build the proposed Laurel Hill Parkway was completely unrelated to petitioner's proposed subdivision. In fact, traffic from petitioner's property would not even have access to the proposed highway.

Upon the Town's rejection of her permit application, petitioner brought this action stating claims for, *inter alia*, an unconstitutional taking of private property without just compensation. The parkway dedication condition was struck down by the trial court on a motion for summary judgment. This portion of the ruling was affirmed by the North Carolina Court of Appeals.

The Supreme Court of North Carolina reversed. In the decision below, the state's highest court held that—contrary to undisputed facts established at trial—the Town had not actually required a "dedication" of petitioner's property for the parkway right-of-way. Instead, the court determined that the Town had required petitioner to "incorporate the alignment of the parkway right-of-way" into the design of her subdivision. *Batch v. Town of Chapel Hill*, No. 121PA89, slip op. at 7 (N.C. Sup. Ct. Jan. 18, 1990). In other words, the court found that petitioner's subdivision permit would be granted if she agreed to forgo development of that part of her property the Town might someday wish to acquire through condemnation. Asserting that the Town was empowered by statute to attach such a condition to the approval of

petitioner's subdivision permit, the state Supreme Court remanded with instructions to dismiss petitioner's federal constitutional claims.

SUMMARY OF THE ARGUMENT

This amicus brief addresses the single issue of a regulatory taking accomplished by the Town's requirement that petitioner dedicate (or "reserve") a right-of-way easement. Despite the insistence of the court below that its decision rests on independent and adequate state grounds, this Court has jurisdiction to review the decision under Supreme Court Rule No. 10.1.(c).

The court below declined to review petitioner's federal constitutional claims, asserting that the taking of petitioner's property was "authorized" by state law. This holding conflicts with this Court's ruling in *Nollan v. California Coastal Commission*, requiring heightened scrutiny of land use regulations challenged under the Takings Clause.

If heightened scrutiny had been applied, as required by *Nollan*, it would be obvious that the Town's subdivision exaction failed to substantially advance a legitimate state interest, and deprived petitioner of economically viable use of her land. Either result would establish a violation of the Takings Clause under *Nollan*.

Finally, the decision below conflicts with the doctrine repeatedly advanced by this Court, that land use regulation may not force certain individuals alone to bear public burdens which should rightfully be borne by the

public as a whole. By requiring petitioner to forgo the development of her land to minimize the cost of subsequent acquisition by the government, the Town has violated the core premise of the Takings Clause as enunciated by this Court in a long line of cases beginning with *Armstrong v. United States*, 346 U.S. 40 (1960).

If the decision below is allowed to stand, petitioner will not be the only party to suffer. This case will put local governments throughout the United States on notice that they may freely abridge individual rights protected by the United States Constitution, so long as their highest state court declines to review the violations.

ARGUMENT

I

THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA

The court below asserts that its decision rests "solely upon adequate and independent state grounds." *Batch v. Town of Chapel Hill*, slip op. at 17. This assertion is a transparent attempt to mislead this Court concerning its jurisdiction to review the decision below.

The Supreme Court of North Carolina, having made factual determinations that differ from the trial court's, attempts to dispose of petitioner's claims simply by squaring the new "facts" with state statutory law: "We do not find it necessary to review or decide any of plaintiff's constitutional claims." *Batch*, slip op. at 16. The court below thus relies on the remarkable proposition that its

own state's legislation takes precedence over the United States Constitution in defining petitioner's fundamental rights.

It is unquestioned that a state Supreme Court is the final authority in matters governed wholly by the laws of its state. Moreover, when a state court's decision rests jointly upon state and federal grounds, the United States Supreme Court lacks jurisdiction to review if the state ground is "independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). However, when a state court decision turns on an interpretation of federal constitutional law that conflicts with previous opinions of the United States Supreme Court, this Court's jurisdiction to review is established under Supreme Court Rule No. 10.1.(c).

The present case raised substantive federal issues, including a violation of the Takings Clause of the Fifth Amendment, from its initial stage of litigation. These issues were decided by the trial court and reviewed by the North Carolina Court of Appeals. The takings issue was extensively briefed by the parties, by this amicus, and by other amici before the Supreme Court of North Carolina. That court's failure to address these issues cannot alter the reality that the issues were before the court.

The decision below pretends to avoid addressing petitioner's federal constitutional rights, but in fact disposes of them by denying their existence. As this case clearly demonstrates, when a court fails to adjudicate an individual's rights, it deprives her of them.

Under the Takings Clause of the Fifth Amendment, "a uniform national 'floor' of protection is established, below which no . . . citizen may be made to stand. The Constitution requires that all states rise at least to the same minimum level of justice." Note, *Ohio v. Johnson: The Continuing Demise of the Adequate and Independent State Ground Rule*, 57 U. Colo. L. Rev. 395, 408 (1986). The decision below deprives petitioner of the minimum level of justice required by the Constitution. Merely draping this deprivation in the mantle of "independent state grounds" cannot insulate the decision below from review by this Court.

II

THE DECISION BELOW, IF ALLOWED TO STAND, WILL RESULT IN A TAKING OF PETITIONER'S PROPERTY WITHOUT JUST COMPENSATION

The court below places great emphasis on its finding of facts different from those established before the trial court. *Irrespective of which set of facts pertain*, however, the Town's actions plainly violate the Takings Clause of the Fifth Amendment. This conclusion follows from a straightforward application of current constitutional standards as expressed by this Court.

This Court has repeatedly stated that land use regulations will effect a taking of private property if they fail to "substantially advance legitimate state interests," or if they "den[y] an owner economically viable use" of property. *Nollan v. California Coastal Commission*, 483 U.S. at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). In *Nollan*, this Court reiterated the foregoing threshold test, emphasizing that a heightened level of

judicial scrutiny must be applied in reviewing land use regulations which are claimed to constitute a taking. *Id.* at 834.

Unfortunately, this lesson was lost on the court below. Far from subjecting the Town's subdivision exaction to the heightened scrutiny required by *Nollan*, the North Carolina Supreme Court began and ended its inquiry with a simple assertion that the Town's actions were "authorized" by state law. *Batch*, slip op. at 15. This degree of scrutiny—amounting to no scrutiny at all—is grossly inadequate under the standards laid down by this Court in *Nollan*.

Like the present case, *Nollan* dealt with restrictive land use regulations imposed as a condition to the issuance of a required permit. One essential lesson of *Nollan* is that such conditions must be reasonably calculated to relieve a public burden created by the proposed use of the property in question. In the present case, however, the Town's desire to construct a parkway is totally unrelated to any burden created by petitioner's proposed subdivision. The subdivision's streets will not directly connect with the parkway, which is a limited access facility. *Batch v. Town of Chapel Hill*, 92 N.C. App. 601, 618, 376 S.E.2d 22, 32-33 (1989). The indirect, incremental traffic flow attributable to the subdivision will be minimal. *Id.* In short, there is no relationship whatever between the need for the parkway and petitioner's proposed use of her land.

This Court has not defined the precise "fit" required between a land use exaction and the burden created by the development. *See Nollan*, 483 U.S. at 838. It hardly

matters what test is applied to petitioner's case, however, because it is clear that the parkway exaction, like the permit condition in *Nollan*, "does not meet even the most untailored standards." *Nollan*, 483 U.S. at 838. The lack of nexus between the parkway exaction and any public burden created by petitioner's proposed subdivision provides sufficient grounds for concluding—regardless of the existence of statutory authority—that the Town's actions failed to substantially advance a legitimate state interest as that phrase was applied to land use regulations by this Court in *Nollan*.

When the parkway exaction is subjected to the heightened scrutiny required by *Nollan*, it is apparent that its actual purpose is identical to that of the condition demanded by the California Coastal Commission in the latter case: "the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." *Nollan*, 483 U.S. at 837.

Regardless of whether the Town required an outright dedication or a mere "reservation" of an undeveloped right-of-way across petitioner's property, the purpose of this exaction was simply to reduce the Town's ultimate cost of acquiring land for the proposed parkway. *Nollan* leaves no doubt that such an interest is not constitutionally sufficient to justify taking property without compensation. "Whatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them." *Id.*

If petitioner had not applied for a subdivision permit, a demand by the Town for dedication of the parkway

easement would clearly have comprised a taking. Requiring such a dedication as a permit condition under these circumstances is "not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Id.*

Furthermore, regardless of which version of the "facts" is accepted in this case, the Town's exaction patently deprives petitioner of economically viable use of her property. Two constitutionally protected property interests are violated by the Town's actions. The first is the fee interest in that part of petitioner's land required for the right-of-way easement itself. The second protected interest is petitioner's right to develop the remaining portion of any lots that are rendered unbuildable by dedication or reservation of the easement. *See Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1067 (N.Y. 1989).

Whether the parkway easement is acquired by the Town as an exaction now, or by formal condemnation later, these property interests will be extinguished by what amounts to a straightforward exercise of the government's power of eminent domain. Any such exercise requires just compensation as a matter of law, by the plain language of the Takings Clause.

Even beyond its clear conflict with the standards laid down by this Court in *Nollan*, the Town's actions violate the Takings Clause by requiring petitioner alone to bear what should rightfully be a general public burden. In addition to examining the nature of the state action embodied in land use regulations, and its economic impact on property owners, this Court has assigned unique significance to this question of fundamental equity. "One of

the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 346 U.S. at 49). The benefit sought by the Town's subdivision exaction is the acquisition of a right-of-way easement for a public throughway. As previously noted, petitioner would derive no special benefit from the proposed parkway; indeed, her property would not even have direct access to it. Any presumed benefits of the parkway would accrue to the community as a whole. It follows as a general principle of constitutional law that the costs of constructing the parkway, *including the cost of acquiring the right-of-way*, must be financed out of general public revenues. The Town is prohibited under the Fifth and Fourteenth Amendments of the United States Constitution from requiring individual property owners to bear the costs of its land acquisition program.

The parkway exaction is an attempt to secure the easement either at no cost by requiring the actual dedication of land, or at a reduced cost by prohibiting petitioner from developing property that may one day be condemned. In either case, such regulatory abuses are clearly prohibited by the Takings Clause as interpreted by this Court in *Nollan* and other cases.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be granted.

DATED: May, 1990.

Respectfully submitted,

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, JR.
R. S. RADFORD
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae,
Pacific Legal Foundation